**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **IN RE:** | ) | Case No. 08-36705-bjh11 |
| | ) | Chapter 11 |
| **SUPERIOR AIR PARTS, INC.,** | ) | |
| | ) | |
| | ) | |
| **Debtor.** | ) | |
| | ) | |
| _____ | ) | |
| **LYCOMING ENGINES, a Division of Avco Corporation,** | ) | Adversary No. 12-03035-bjh |
| | ) | |
| **Plaintiff,** | ) | Courtroom 2 |
| | ) | 1100 Commerce Street |
| **versus** | ) | Dallas, Texas 75242-1496 |
| | ) | |
| **SUPERIOR AIR PARTS, INC.,** | ) | |
| | ) | May 15, 2012 |
| **Defendant.** | ) | 1:31 P.M. |

TRANSCRIPT OF CASE NO. 08-36705-BJH11: MOTION TO REOPEN CASE FILED BY SUPERIOR AIR PARTS, INC. (662)
TRANSCRIPT OF ADVERSARY PROCEEDING 12-03035-BJH: MOTION FOR REMAND FILED BY PLAINTIFFS LYCOMING ENGINES, A DIVISION OF AVCO CORPORATION, TEXTRON INNOVATIONS, INC. (13).
BEFORE HONORABLE BARBARA J. HOUSER
UNITED STATES CHIEF BANKRUPTCY JUDGE

APPEARANCES:

| | |
|---|---|
| For Superior Air Parts, Inc.: | Passman & Jones<br>By: JAMES F. ADAMS, ESQ.<br>JERRY C. ALEXANDER, ESQ.<br>CHRISTOPHER ALAN ROBISON, ESQ.<br>1201 Elm Street, Suite 2500<br>Dallas, Texas 75270 |
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APPEARANCES:
(Continued)

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EXHIBITS

| DEBTOR'S EXHIBITS | MARKED | ADMITTED |
|---|---|---|
| 1 through 20 | 16 | 16 |
| 21 through 25 | 15 | 15* |
| 26 through 34 | 16 | 16 |

*Admitted under seal.

THE COURT: Be seated, please. All right. We'll take up appearances in Superior Air Parts and the related adversary proceeding.

MR. ADAMS: Your Honor, Jim Adams on behalf of Superior Air Parts, the debtor and defendant in the case.

With me from Passman and Jones is Jerry Alexander and Chris Robison.

And then we have some witnesses today: Mr. Tom Tong who is with Locke Lord and Mr. Tim Archer, with the red tie on, and Mr. Kent Abercrombie in the back, and then Mr. Chuck Dedmon in the front.

THE COURT: Excellent. Good afternoon. Mr. Olson?

MR. OLSON: Your Honor, Dennis Olson representing Avco/Lycoming. I have with me Mr. Charles Smith, who's with the firm Smith and Moore, he's designated as a witness, he's also the attorney of record that filed the suit in State Court. With him is David Denny, an attorney in his firm.

THE COURT: Excellent. Good afternoon.

UNIDENTIFIED ATTORNEY: Good afternoon, Your Honor.

THE COURT: All right. Well, thanks, everyone, for your flexibility. We had -- and I hope Ms. Salcido made this clear, we just had the opportunity to move this up, and get you done sooner today. So, we thought we'd at least check with you and see if that worked. So, I'm glad it did for everyone.

Are we ready to proceed?

(No audible response heard)

THE COURT: I think we should first, obviously, take up the motion to reopen, and then once we've addressed that, we'll take up the motion for remand and motion to dismiss.

MR. ADAMS: Yes, Your Honor. Your Honor, we filed the motion to reopen basically for two main reasons:

One is there seems to be a split of authority on whether or not you can have a adversary proceeding in a case that is closed. Some case -- some opinions say, "Yes, you can." Others say, "You can't." We decided it would be a better practice to go ahead and spend the filing fee and file the motion to reopen, depending on -- well, not knowing which way the Court preferred it to be done. Also --

THE COURT: Your government thanks you.

(Laughter)

MR. ADAMS: Yes, that was $1,000 filing fee, if I remember correctly. And my credit card did go through on that one.

(Laughter)

MR. ADAMS: Your Honor, and the second reason is there will be a discussion about whether or not Lycoming has filed any pleadings requesting a declaration from a court that the license agreements at issue were rejected in the bankruptcy or not, and there's some technical aspects to that that we were hoping that if the case was reopened and the Court had found

that there were some problems on whether or not the licenses were rejected, we were hoping to try to remedy that situation through 1142 or something like that to be able to address that issue. Again, we're hoping we don't have to reach that point, but that was our second basis for doing it as a discussion in the motion.

In particular, the Fifth Circuit has said that -- in the matter of Case (phonetic) that motions to reopen should be granted -- well, should be considered broadly and/or discretionary or, generally speaking, granted. And among other reasons is to enforce the discharge injunction and to interpret or clarify the terms of a confirmed plan.

And in this particular case, we are contending that the plan might need to be clarified as to whether or not the license agreements survive the bankruptcy, and if so, whether or not the indemnity provisions of the license agreements were discharging debts under that were discharged in the bankruptcy.

And we also quoted some material from the plan and order whereby this order retained exclusive jurisdiction, as mentioned in Section 12.01 of the confirmation order, I believe it was.

And, therefore, we -- citing 1127(b) and 1442(c) of the Bankruptcy Code, we had asked that the Court reopen the case and, of course, Section 350 of the Bankruptcy Code.

THE COURT: Very well. Mr. Olson?

MR. OLSON: Your Honor, of course, we oppose the reopening of the case. We think the Court needs to reopen the case if the Court decides to remand.

I think if the Court decides to remand, it's whatever the Court's policy is on having an open adversary with a main case.

THE COURT: Well, but --

MR. OLSON: I have no opinion either way.

THE COURT: Right. But if that's the case, I'm hearing you not really opposing reopening, what you really want is for me to remand the adversary proceeding and then reclose the case.

MR. OLSON: That's another way to do it, and I don't have a bit of problem with that.

Also in response to the comments about the rejection, non-bankruptcy lawyers filed this in State Court. And in the exchange of letters, they've kind of gotten off on that, and you may have seen those exhibits. But for whatever it's worth, my review of the file and the record would indicate that the license agreements were not rejected, passed right trough, they were never addressed, scheduled, or anything else. I think everybody operated for years post bankruptcy believing that those license agreements were in effect.

If that's their position, as well, we could just stipulate to that. And I'm not trying to trap them, but I

think that the discourse kind of got off on that tangent. But I would ask you if that is ya'll's position?

MR. ADAMS: Your Honor, I'd be happy to address that in the motion to remand. On that -- if you'd like a preview of that, I can go ahead and give that to you.

THE COURT: Well, I mean I think Mr. Olson's question was just simpler: Are you contending -- you're not -- are you contending that the agreements were rejected? Because I don't --

MR. ADAMS: No, Your Honor.

THE COURT: -- read you --

MR. ADAMS: No, Your Honor.

THE COURT: to be contending that.

MR. ADAMS: There are two parts to the agreement, at least.

THE COURT: Yes.

MR. ADAMS: There are two parts to the agreement, at least, and the -- one is that you pay your money, you get your perpetual license. And it's kind of unique because it's up-front payment, rather than ongoing royalties. We believe that that, without a doubt, survived the bankruptcy.

But we also believe that it's possible that the indemnity provision in the license agreement -- any claims arising from that were discharged in the bankruptcy and we've cited some authority for the concept --

THE COURT: No, no, no. I understand all that.

MR. ADAMS: Okay.

THE COURT: The question that I think Mr. Olson was raising is do you contend that you rejected this agreement under 365?

MR. ADAMS: No.

THE COURT: I understood the debtor to be taking the position that this was not an executory contract on the petition date. You didn't schedule it on G, et cetera, et cetera.

MR. ADAMS: Yes, correct, Your Honor. Correct, Your Honor.

And we believe that it did not need to be scheduled and, no, it was not rejected in the bankruptcy.

THE COURT: Okay.

MR. OLSON: And we would agree with that and stipulate to that.

THE COURT: All right.

MR. OLSON: And that's --

THE COURT: So, the parties are stipulating this was not an executory contract.

MR. OLSON: Yes, ma'am.

THE COURT: Okay. Mr. Olson -- I mean, Mr. Adams?

MR. ADAMS: Yes, Your Honor.

THE COURT: Okay. Great. Well, I'm going to reopen

the case. Quite frankly, I don't know how you can remove an action to Bankruptcy Court in a closed case. There's nothing to remove it to.

So, I would definitely be the line of authority that says you can't -- I mean I know that there are some cases out there that have said that an adversary proceeding can continue once a bankruptcy case is closed. But that's an adversary proceeding, and I think that case law are adversary proceedings that were pending at the time of closure.

Once a bankruptcy case is closed, there's nothing here to attach to. And, quite, frankly, just to be blunt, I have talked to my Clerk of Court about how in the world you successfully removed an action into a closed case. And at least I don't think that's ever going to be possible again, that you're not going to be able to remove until a case actually pends here. Because otherwise, there's nothing to append it to.

MR. ADAMS: We saw something in Section 350 on Colliers, and it's talking about going both ways, and didn't see anything from the Northern District of Texas, so we figured to be safe is the better thing to do.

THE COURT: Well, and I agree with that. But the further anomaly is I just -- again, I think the cases that you're relying upon that say that an adversary can pend in a closed case are adversaries that were pending at the time that

the court went ahead --

MR. ADAMS: Oh, okay.

THE COURT: -- and closed the main case. I don't think we can have an adversary proceeding that just mysteriously appears when we have no bankruptcy case pending at the time. So, like I say, I think you all may be the last group that would be permitted to remove a case here before you actually got the bankruptcy reopened. Because I don't know how -- I mean that's all sort of metaphysical to me. We don't have a bankruptcy case, and the only way a court can have -- a Bankruptcy Court can have jurisdiction is if there is something to attach it to. But --

MR. ADAMS: Perhaps the ECF geniuses who designed the system foresaw having to remove a case timely and whether or not that had anything to do with it. I don't know.

THE COURT: Maybe so.

MR. ADAMS: I don't know.

THE COURT: But in any event, I found it to be slightly odd. But with that said, I'm going to grant the motion to reopen so that we can then reach the merits of the plaintiff's request to remand and the defendant's request that I dismiss the amended complaint.

MR. ADAMS: Right, Your Honor.

Your Honor, procedurally, how do you want us to proceed on the motion to remand?

THE COURT: It seems to me that the issues are reasonably intertwined. But let's take the remand first because obviously if I remand the case --

MR. ADAMS: Right.

THE COURT: -- I wouldn't consider the dismissal. That would go back to State Court for the State Court judge. But truthfully, I'm not going to rule on one without hearing because the factual circumstances appear to be substantially intertwined.

MR. ADAMS: And do you want the movant to start?

THE COURT: Yes.

MR. ADAMS: Okay.

THE COURT: Please.

MR. OLSON: Your Honor, just by way of chronology and asking the Court to take judicial notice of the fact that the order confirming the third amended Chapter 11 plan was entered August 27th, '09, the final decree was entered 9/23/2010, and the case was closed October the 8th, 2010.

THE COURT: Any objection to the Court taking judicial notice of those dates?

MR. ADAMS: Your Honor, I believe that all those dates are correct.

THE COURT: Excellent. The Court --

MR. ADAMS: Your Honor, by the way, there should be a notebook up there with --

THE COURT: I have it.

MR. ADAMS: Okay. -- with a bunch of exhibits and pleadings in it. And I believe that there's no objection to any of those being admitted for the hearing today.

MR. OLSON: That is correct. A number of the exhibits are taken from documents that were filed with the Court under seal, and counsel for both sides want to protect that. So, if Mr. Adams could retrieve the Court's binder when the Court's through with it, we think that's a solution --

THE COURT: Well, I can't let you --

MR. OLSON: -- maybe not the Court's best solution.

THE COURT: I can't let you take exhibits that are admitted into evidence. You can't take them back, they're part of the record.

MR. ADAMS: Your Honor, in that case --

(Pause)

MR. OLSON: I think what both sides are concerned about is the nondisclosure agreement, and third parties may be seeing it.

I don't know if the Court can take judicial notice of the documents since the Court was provided a copy, and let us go from --

THE COURT: When was I provided --

MR. OLSON: -- that way and not offer the document.

THE COURT: What -- let's be specific. What exhibits

are we talking about?

MR. ADAMS: Your Honor --

MR. OLSON: 21 --

MR. ADAMS: Exhibits 21 through 24 are the -- the first three are the 1999 agreement documents. And then Exhibit 25 is the 1981 agreement.

THE COURT: Yes, but those aren't things of which the Court can take judicial notice.

MR. OLSON: I --

MR. ADAMS: True.

MR. OLSON: I think both sides need the exhibit admitted.

MR. ADAMS: Your Honor --

MR. OLSON: Can we have a moment to confer?

MR. ADAMS: -- may we confer?

THE COURT: Of course.

(Pause)

MR. OLSON: Question out of ignorance: Since these were filed under seal --

THE COURT: What were filed under seal?

MR. ADAMS: Your Honor, Exhibits 21 through 25 were filed under seal with the Court earlier in connection with -- I believe it was the motion to reopen the case.

THE COURT: You mean the motion to reopen --

UNIDENTIFIED ATTORNEY: It was either the -- I think

it was the motion -- the first motion to dismiss --

MR. ADAMS: First motion to dismiss.

UNIDENTIFIED ATTORNEY: -- filed, Your Honor.

MR. ADAMS: There were the license agreements --

THE COURT: No.

MR. ADAMS: Okay.

THE COURT: Hang -- just -- so, the motion to dismiss the original complaint --

MR. ADAMS: Correct, Your Honor.

THE COURT: -- you're telling me that these exhibits were attached to that, and there's an order sealing them.

MR. ADAMS: Correct, Your Honor.

THE COURT: Well, why don't we just admit them and admit them under seal in this hearing.

MR. ADAMS: And just reseal them.

MR. OLSON: That's fine, Your Honor.

MR. ADAMS: That's what we were going to ask is if -- since they came in under seal, can we use them and just put them back under seal.

THE COURT: Yes.

MR. OLSON: That's fine, Your Honor.

THE COURT: All right.

MR. ADAMS: Thanks. And, again, that's 21 through 25.

THE COURT: All right. Exhibits 21 through 25 are

admitted, and they will be sealed. And I take it Exhibits 1 through 20 and 26 through 34 are admitted without objection?

MR. OLSON: Correct.

MR. ADAMS: Yes, Your Honor.

THE COURT: Very well. Please.

MR. OLSON: Your Honor, I think that the evidence that's been admitted so far would show that the license agreement, Exhibit 21 in Paragraph 5, says that to get your license, you do three things:

You pay money, which they paid years prepetition;

And you provide insurance;

And you indemnify.

In November of 2011, 13 months after the case was closed, suits were filed in which my clients made demand on Superior for indemnification, and no indemnification was provided. So, suit was filed in January of this year, and the case was eventually removed to this Court.

We think that when you refuse to perform on the indemnity, it's a repudiation of the license agreement or at least gives my clients the right to terminate the agreement.

And so in our suit, we're claiming that there is no license, either because of our termination or the repudiation. And, as a result, as we're sitting here, Superior is making parts, selling parts, competing with us without a license.

So, the suit seeks injunctive relief, declaratory

relief, and damages. And in calculating the damages, we think it's from the date that we terminated, or maybe as far back as the date of the repudiation, which would be ostensibly in January.

We see the various causes of action asserted under Texas law as attempts to explain what they're doing while they're making parts and selling parts, and so on, whether you call that a conversion or any of the other theories of causes of action that we've pled.

But we're not seeking in this suit to look at anything that happened before these suits were filed in November of 2011.

THE COURT: But doesn't everything in your suit turn on whether or not your indemnity claim is a prepetition claim? I mean you're alleging -- you're alleging that you terminated the agreements for the reorganized debtor's failure to pay -- failure to indemnify you, failure to pay defense costs and otherwise take over litigation that was filed against you post confirmation, right?

MR. OLSON: Yes, ma'am.

THE COURT: But if those indemnity claims were prepetition claims that got discharged in the bankruptcy, then there's no basis for you to claim breach prompting termination.

MR. OLSON: Well, I think there is.

THE COURT: Which is?

MR. OLSON: Let me try an analogy this way, something that we see much more commonly.

Debtor files an individual case, gets a discharge, doesn't reaffirm the car, the house. The liability for the deficiency claim, or the note balance, is discharged.

But if you want to keep the collateral -- or, in this instance, if you want to keep the license, you've got to keep performing.

THE COURT: I don't think so.

MR. OLSON: If you don't, you can take it back.

THE COURT: Not if it's -- not if it's -- not if it's not executory.

MR. OLSON: Sure. You've got a situation where --

THE COURT: I mean the debtor didn't have to reaffirm anything here.

MR. OLSON: No, no, no. No, no, no. It's -- in both instances, you're talking about something that's no longer property of the estate.

THE COURT: Well, but, no --

MR. OLSON: That if they want to use it --

THE COURT: Wait, wait, wait. Try your analogy again because I'm not following.

MR. OLSON: Well --

THE COURT: Because this isn't an individual debtor.

MR. OLSON: No, no.

THE COURT: So, reaffirmation doesn't apply.

MR. OLSON: No, I understand that. But we're talking about how something post bankruptcy that you don't have an obligation to pay for anymore, the obligation to pay has been discharged --

THE COURT: No.

MR. OLSON: But if you want to keep the license, you've got to keep performing.

THE COURT: Where does -- where do you -- you cited me to nothing, Mr. Olson, that supports that position in your papers. Have you?

MR. OLSON: No, I have not. I think that it's just that simple.

THE COURT: Well, but --

MR. OLSON: You've got one --

THE COURT: -- then there should be a whole host of cases that tell me it's that simple because I'm not seeing that.

MR. OLSON: Well, you --

THE COURT: If it's not executory, and the payment obligation got discharged for your client's failure to file a proof of claim, then the debtor has a perpetual license and discharge the obligation to indemnity.

MR. OLSON: You can lose the license, though.

THE COURT: How?

MR. OLSON: Continuing to make our parts, use our plans, and when those planes that you put those parts on crash, you don't step up and perform the indemnity in the insurance provision for the license, you can lose the license.

THE COURT: But cite me --

MR. OLSON: It's --

THE COURT: Cite me a single case that supports that proposition. Because you haven't.

MR. OLSON: Well --

THE COURT: And there's a lot of cases that say a prepetition indemnity agreement is a prepetition claim for which a proof of claim should have been filed. Admittedly it was a contingent claim. Admittedly it had not yet matured with respect to airplanes that crashed post confirmation. But the claim could and should have been filed, and when it wasn't, it got discharged.

MR. OLSON: Yes, ma'am. But if -- when we get sued and we ask you to perform the indemnity and you say I've got a complete defense of discharge in bankruptcy, and the Texas rules provide for that --

THE COURT: Right.

MR. OLSON: -- then we can say, "Okay, but you can't make our parts anymore, you can't keep selling and competing if you don't."

THE COURT: I don't --

MR. OLSON: You can forfeit the license. You can have all the fruits of what you took up until that point.

THE COURT: I hear you. But what's the theory, and where's your law that supports that?

MR. OLSON: Well, I think that --

THE COURT: I mean I understand your argument. But you've cited me absolutely noting that supports that proposition.

MR. OLSON: Well, you're either standing on the contract or you're not. And if you want the benefits of the contract, the license, the access to the plans, the ability to sell and complete, then you perform.

If you don't want the benefit of the contract, you can walk away from it, and you don't have any license -- any obligation except quit selling, quit competing, quit using our plans.

THE COURT: Okay. Again, we're -- I understand exactly what you're saying. You have cited me nothing --

MR. OLSON: Well --

THE COURT: -- to support that proposition --

MR. OLSON: I think that the first --

THE COURT: -- under State law or, frankly, bankruptcy law.

MR. OLSON: The first thing that comes to my mind would be GAB versus Hanks, the Texas Supreme Court case. It's

about 30 years old, I can't put it much closer than that. But that's where you've got a contract that has several parts to it, and you can't keep wanting to reject the rest.

THE COURT: That's --

MR. OLSON: You're either on it, or off it.

THE COURT: That's not a bankruptcy decision, so it doesn't have anything to do with the effect of bankruptcy on one of the parts.

MR. OLSON: But I think --

THE COURT: Right?

MR. OLSON: -- under Texas contract law here as to what is this creature, this license agreement that survived the bankruptcy, and you go down the road several years --

THE COURT: But the obligation to indemnify got discharged.

MR. OLSON: And that's fine. If that's been discharged, and they can plead that in State Court --

THE COURT: Well, they can plead it here --

MR. OLSON: That's right.

THE COURT: -- if I keep it here.

MR. OLSON: That's right. They can do that. But when they do, the Texas law question then is can we then terminate the license. Say from this day forward, "Make no more parts, make no more sales." How can they keep competing with us and making those parts, and they go down and we get

sued, and they don't? See, that's the unfair part of it.

THE COURT: Well, I hear about it being unfair, but you could have solved that. You could have filed a claim in the bankruptcy case.

MR. OLSON: Well --

THE COURT: And that claim then would have survived. But you didn't do a thing.

MR. OLSON: No, I understand.

THE COURT: And "you" personally --

MR. OLSON: I understand.

THE COURT: -- is not personally. Your clients did not --

MR. OLSON: And the reason --

THE COURT: -- do anything to protect themselves from that scenario.

MR. OLSON: On the discharge, that's right. But, again, this license was one of the things sold to Brantly, it's an asset.

THE COURT: Right.

MR. OLSON: Everybody understood that. We were not on the mailing list, we were not on Schedule F.

THE COURT: Well, that's not really true.

MR. OLSON: We were present for a lot --

THE COURT: Ms. Rockaman (phonetic) filed a notice of appearance --

MR. OLSON: She was.
THE COURT: -- on behalf of your client.
MR. OLSON: And later -- and later --
THE COURT: We checked that today.
MR. OLSON: And post confirmation --
THE COURT: So, your client got copies of everything.
MR. OLSON: We're not claiming no notice. She sat through this thing, started off as the buyer.
THE COURT: Absolutely.
MR. OLSON: So, the collective group -- and that's what I said earlier, I don't think anybody that's involved thought that this license agreement was rejected or went away, or that it was executory.
THE COURT: Right.
MR. OLSON: I think everybody treated it -- it passed through to Brantly. Now Brantly has bought an asset. And if they want to continue to make and sell and compete, they can. They've got the right to do that.
When the demand is made to perform on the indemnity, and they opt not to do that, I think they can do that.
But when they do, I think that gives us the right to terminate, treat that as a repudiation.
THE COURT: Well, I understand you think that. It would now be helpful if there was legal authority that supported your position. Because, again, you've cited me

nothing.

MR. OLSON: Well, GAB versus Hanks --

THE COURT: Well, but you --

MR. OLSON: -- would stand for that proposition.

THE COURT: You're citing that to me for the first time here without --

MR. OLSON: That's -- that's true, Your Honor.

THE COURT: And it's not a bankruptcy involved case, I'm guessing.

MR. OLSON: No, it's not. But I think that sometimes I err in not giving more extensive briefing under the assumption that that's something that we're all familiar with, and I apologize for that.

But I do think that the concept that you're either standing on the contract or you're not standing on the contract is one of the most basic fundamentals of contract law. And I don't think they can have it both ways. They -- they got out of here with the contract with our blessing.

THE COURT: And, again, I understand that that's what you think. But it would be helpful if there was legal authority that supports your view of what the law should be because bankruptcy potentially has interfered with that thinking.

Now the case law is, I think, abundantly clear that the indemnity claim of your clients is a prepetition claim. I

can cite you a lot of cases that we have found that so hold that --

MR. OLSON: Oh, and I agree with that.

THE COURT: -- prepetition agreement gave rise to a contingent, unmatured indemnity claim that got discharged --

MR. OLSON: And I agree with that.

THE COURT: -- because nobody filed a proof of claim.

MR. OLSON: And I agree with that.

THE COURT: So, now if the indemnity obligation has been discharged, query how you revive it.

MR. OLSON: It --

THE COURT: It got discharged.

MR. OLSON: The debtor, post discharge, can say, “I don’t want to.” It clearly has the right to do that.

THE COURT: The debtor has no legal obligation to pay. It doesn’t have to say, “I don’t want to.” The debtor is legally excused from paying.

MR. OLSON: But I’m saying, like the mortgage company, if you quit, I can take the house. If you quit, I can take the license.

THE COURT: Well, but see --

MR. OLSON: Because otherwise you can’t say that there’s any fairness --

THE COURT: But see, the mortgage didn’t get discharged, that’s the difference. The mortgage obligation

didn't get discharged in bankruptcy. The mortgage obligation survives the bankruptcy, either through reaffirmation in a Chapter 7, or because it's not dischargeable in a Chapter 13. It survives.

What -- the debt that you restructure in a 13 under the plan is the arrears. But unless the mortgage is going to mature within the term of the plan, you don't discharge a mortgage in Chapter 13. You -- you get the ability to pay the arrears over time, but the mortgage survives.

MR. OLSON: What the debtor gets --

THE COURT: That's statutory.

MR. OLSON: What the debtor gets in a Chapter 7 is discharge of the deficiency. If they quit paying, they lose the car through repossession, they lose the house through foreclosure. The lender can't pursue the deficiency claim because of the discharge.

THE COURT: Not quite, but we aren't dealing with a mortgage so --

MR. OLSON: I understand. But I think that if you buy a license -- if somebody --

THE COURT: And paid for the license.

MR. OLSON: -- says that it's transferable --

THE COURT: Right?

MR. OLSON: -- assignable --

THE COURT: They fully paid for the license?

MR. OLSON: Prepetition.

THE COURT: Yes. But I mean they paid for a perpetual license.

MR. OLSON: But it's perpetual only in the sense that there's no term. It doesn't expire.

THE COURT: Right.

MR. OLSON: You can still lose your license.

THE COURT: If you don't do something, you're still obligated legally to do --

MR. OLSON: Which is to insure --

THE COURT: And my point -- my point is is that they discharged, at least as I'm thinking it now -- and, frankly, you didn't cite me anything to the contrary -- that they discharged the obligation that you want to now claim they've breached. And if it's been discharged, it can't be breached.

MR. OLSON: I -- I understand, and I'd like to give you some authority. But I'm telling you we're not fighting them on the concept that it's discharged if that's the way they want to treat it. But they don't get to keep making -- keep using our plans, keep competing if they don't perform on what it takes to keep the license. That's Paragraph 5 of Exhibit 21.

They can go either way. If they say, "That was discharged," then they're not standing on the contract anymore, and it's gone, and we understand that. We were never told that

until January of this year, so that's when their damages would start.

But if they want to keep the license, keep competing, they have to keep performing.

THE COURT: I understand your argument.

MR. OLSON: Let me see if I can get you some authority that would -- I know we're not communicating, and I apologize for that.

THE COURT: No, we are communicating. I mean I understand exactly what you're telling me, I just -- unfortunately you gave me no authority to support that. And at least I don't know that I agree with it as a matter of law. And, frankly, you didn't help me come to your conclusion by giving me any authority that we could read in preparation for today's hearing.

MR. OLSON: I understand.

THE COURT: So, I mean --

MR. OLSON: I understand that.

THE COURT: But I understand your argument exactly, and I understand that it seems unfair --

MR. OLSON: Um-hum.

THE COURT: -- because I had to think about that piece myself.

But the problem is is I don't think you can declare a breach of a contract when the obligation under the contract has

been discharged in bankruptcy. They didn't breach it, they just no longer have any legal obligation to perform.

So, again, I'm all ears to --

MR. OLSON: But if --

THE COURT: -- read your authority, but --

MR. OLSON: My point is if they don't have any obligation, we don't either.

THE COURT: No, they bought the perpetual license, and that still exists. That passed -- to use your words, "that passed through the bankruptcy."

MR. OLSON: But the cost --

THE COURT: You didn't argue that this was an executory contract.

MR. OLSON: No, ma'am.

THE COURT: And you could have either -- you could have come in and said, "Judge, they're wrong, this is executory, make them assume it or reject it." And if they assume it, they're going to have to cure the prepetition breaches.

MR. OLSON: Which were none.

THE COURT: Well, but you would have then preserved the indemnity right because you would have argued about that. But you didn't do anything --

MR. OLSON: No, ma'am.

THE COURT: -- in the case. So, I'm struggling with

how you can declare a default on an obligation that got discharged. I mean you're -- the only defaults you've declared under this license -- either of the licenses is the failure to indemnify you.

MR. OLSON: Yes.

THE COURT: And --

MR. OLSON: And if -- it's --

THE COURT: If that -- if the debtor no longer has that obligation, then I guess I'm struggling how that can be properly declared a default.

MR. OLSON: Well, and, again, maybe we're not using the right terms. But if we're put on notice in January that they're no longer standing on the contract, and we can put them on notice, and we're not standing on it either and your license is gone.

THE COURT: But they are standing on the contract. They're just --

MR. OLSON: Then they --

THE COURT: The --

MR. OLSON: Then they need to step up --

THE COURT: The one provision that was discharged no longer is enforceable against them, I think, is their argument because --

MR. OLSON: Well --

THE COURT: -- they got it discharged.

MR. OLSON: I do, too, but I don't see how they can have their cake and eat it too.

THE COURT: And sadly the answer may be because you guys didn't do anything to protect yourself in the bankruptcy case, and you're now bound.

MR. OLSON: Well, I hear you. I --

THE COURT: I mean that happens all the time. Republic Supply versus Shoaf, as an example.

MR. OLSON: Sure. Espinosa, and so on.

THE COURT: Right.

MR. OLSON: But I would like some time to submit you some authority on that because I think that's the linchpin of the hearing today.

THE COURT: It's the linchpin of everything, frankly --

MR. OLSON: I think it is.

THE COURT: -- as I see it.

MR. OLSON: I think that's right. And --

THE COURT: If they aren't in breach, then -- and we spent a lot of time -- I don't want anybody to think we're sort of --

MR. OLSON: No.

THE COURT: -- truncating this. We spent a lot of time getting ready for this hearing. But it seems to me that with respect to the motion to dismiss, based on our work, and

you can argue with me, every claim, except possibly the business disparagement claim, which, frankly, I don't think you've pled facts that support Iqbal or Twombly, but that's sort of another issue.

But everything else rises or falls on "they didn't do what they were supposed to do, therefore, they've stolen our designs. They didn't do what they were supposed to do, therefore, they can't use it anymore."

MR. OLSON: That's right.

THE COURT: Et cetera, et cetera. So, to me, the whole linchpin, everything is what happened to the contract in the bankruptcy process. And specifically narrowing it down further -- because you now agree -- there appeared to be some dispute in the papers, and I agree with you, Mr. Olson, that I think non-bankruptcy people were using language loosely. But we now have the stipulation that the licenses were not rejected, that they were not executory contracts subject to assumption or rejection. So, that's now of record and stipulated to.

So, now the issue is did the indemnity obligation get discharged. Which I think I heard you say that it did, you didn't disagree with that --

MR. OLSON: Well --

THE COURT: -- but, to use your words, you don't think they can have their cake and eat it, too.

MR. OLSON: That's right.

THE COURT: That if they want to use the license going forward, they then have to fully perform even if the indemnity obligation was discharged.

MR. OLSON: That's right. I -- I -- I don't have a lot of heartburn with saying that it was discharged. I think a more preferable construction would be that it passed through unaltered, and it goes on, the relationship is as though there were no bankruptcy.

And if you look Shoaf and Espinosa, and some of those cases, and some of the others that we've had in recent years about what to put in a Chapter 13 plan, how much has to be in there or not, in fairness to us, and in fairness to Ms. Rockaman, there was nothing in here that said "We're going to keep the license, but we're going to discharge any obligation, and so we can sell and use your plans, and compete, and never have any downside for doing so."

THE COURT: But people don't normally say that.

MR. OLSON: Well, in Shoaf, they said "We're going to discharge the guarantors."

THE COURT: Well, but you all didn't file --

MR. OLSON: And in Espinosa --

THE COURT: -- a claim. There wasn't anything to tell you.

MR. OLSON: That's right. They didn't owe us

anything.

THE COURT: It's just a legal -- well, but there was admittedly a contingent unmatured obligation under the indemnity. I mean you can't really argue with that.

MR. OLSON: I don't. I don't argue with you about that.

THE COURT: So, a claim within the meaning of the Bankruptcy Code existed, and could have been filed if you had wanted to.

MR. OLSON: And would have been allowed.

THE COURT: And then you could have estimated the indemnification claim on a going forward basis, or whatever.

MR. OLSON: Well, it's the --

THE COURT: I mean there are remedies that the Code provided to the holder of a contingent unmatured claim. And, unfortunately, your client didn't exercise any of those remedies.

MR. OLSON: No, that's true.

THE COURT: And now it's potentially coming back to bite them. But the debtor doesn't have to tell them, "Oh, by the way, there's a contingent claim, you should do something because we're going to discharge it." That's just as a matter of law the effect.

MR. OLSON: No, it's -- that's not the disclosure I would have looked for. The disclosure I would have looked for

would have said, “We’ve got the license agreement now, and we’re not going to insure, we’re not going to indemnify, we’re just going to use your plans and make your parts, and compete with you. And if the planes crash, we don’t have to pay.”

THE COURT: I don’t know why they would have to tell you that in a plan.

MR. OLSON: Well, I think it’s little bit of --

THE COURT: Of course they were going to --

MR. OLSON: -- a hidden vulture.

THE COURT: Of course they have a license. There’s a perpetual license, you gave it to them. You knew about it.

MR. OLSON: It has no expiration.

THE COURT: And, frankly, if the effect of -- the legal effect of not filing a claim is that the claim got discharged. I don’t think the debtor has to tell people all the bad things that might happen to them. Again, there was experienced counsel of record for your client in the case.

MR. OLSON: That’s right.

THE COURT: They had very sophisticated bankruptcy counsel representing them.

MR. OLSON: They did. And I -- I -- I think that’s why my thinking is that it just passes through unaltered, and the relationship is the same going forward. Otherwise the purchaser -- if he knows, “You know, I can’t ever be sued for this, and I don’t have to pay for insurance,” my profit margins

just went way up.

THE COURT: But see ride through was a concept of executory contracts.

MR. OLSON: Well --

THE COURT: And --

MR. OLSON: It's --

THE COURT: And that's what -- and the First Circuit never recognized ride through. In fact, expressly didn't.

So, I mean, I'm struggling -- I know exactly what you're saying.

MR. OLSON: Let me see if I can find something to help you a little.

THE COURT: The problem is is that there were remedies that would have protected your client's interest with respect to this contingent unmatured claim. And, again, they just didn't do anything.

MR. OLSON: No, I -- I understand that, and I -- I just am not articulating well enough why I think that that's not the end of the inquiry. The fact that it was discharged, I think --

THE COURT: No, no.

MR. OLSON: -- leads to --

THE COURT: You're articulating it perfectly well. I understand exactly what you're saying.

MR. OLSON: And leads to under what conditions can we

terminate the license.

THE COURT: Right. But, again, you didn't give me any authority.

MR. OLSON: I understand.

THE COURT: I understand your argument. But it's just an argument without any legal authority to support it at the moment. And unfortunately --

MR. OLSON: I didn't -- I had my blinders on. I didn't see that would be where the Court would have a hangup. I apologize for that.

THE COURT: Well, no, I mean that one seems relatively -- well, no. But, again, I -- you know, it seems to me that the debtor discharged the obligation, and I don't know how you declare a default on a discharged obligation. And that, at least at the moment, is where my thinking is. And if you can't declare a default, then all the bad things that you claim they've done aren't bad things. You know, yes, they've continued to use the license and, yes, they've continued to do other things. But at least it appears they have that right, and that -- again, I'm struggling with how you breach a contract when the only breach is an obligation you no longer have a right to expect them to do. And that's where you may -- I mean obviously you still think there is a right to enforce that provision, and I, at least, think it was a discharged obligation and, therefore, I'm struggling with how there's

still a legal right.

MR. OLSON: Well, I think that if they don't have the obligation to pay me anymore, we've done away with involuntary servitude, I can quit doing business with them. I can terminate.

THE COURT: Well, but -- no, your license -- show me where in the license agreement you have that right.

MR. OLSON: Well --

THE COURT: That's the problem.

MR. OLSON: The consideration is Paragraph 5 of Exhibit 21, it's in three parts. They fully performed the cash.

THE COURT: Correct, they did.

MR. OLSON: They were current on the insurance and the indemnity.

THE COURT: Right.

MR. OLSON: Post confirmation.

THE COURT: Yup. Yup.

MR. OLSON: But I think they go hand-in-hand. They can stand on the contract in January of '12, or they can get off of the contract in January of 12, and I think it's their call.

THE COURT: Well, again --

MR. OLSON: But I don't think they can do both.

THE COURT: -- some legal authority to support that

would be helpful under the circumstances of the obligation that you think they have is a prepetition claim that got discharged in bankruptcy. And to me, that's the narrow issue that you need to help me with.

MR. OLSON: All right.

THE COURT: Because I don't know how you breach an obligation that was discharged.

MR. OLSON: Well, the question is what remedy do I have upon discovery that they're not going to perform, and that your suggestion and answer may be none. And I don't want to concede that yet.

THE COURT: Well, and, you know, I'm happy to read any authority to the contrary. But the way it logically flows to me is you had says to protect yourself, you didn't exercise them, the obligation to indemnify you got discharged as a prepetition claim, and I don't know how you now claim breach of a discharged obligation as the triggering event to terminate a contract that otherwise still is in effect and gave them rights. That's the hangup I've got. Because that's the only default you're claiming.

MR. OLSON: Everything stems from that. If they'd have said, "Sure, our carrier had these lawyers, and away we went," we wouldn't be here.

THE COURT: Understand.

(Attorneys engaged in off-the-record colloquy)

MR. OLSON: The other thing that we would want to address, if we could submit some briefing also, is if the answer is that we have no right left, we want to spend some time to focus on what's left of our complaint, and whether we think we could further amend it.

THE COURT: Well, so instead of dismissal, you want the opportunity to amend but --

MR. OLSON: Well, I think --

THE COURT: Let me just make sure I heard you right. Is that true?

MR. OLSON: No. What I'm saying is we had asked for some time to submit you some briefing on what right we may have upon learning that they're not going to perform.

THE COURT: Right.

MR. OLSON: And as a second part to that is if the result of our briefing is that the Court's position remains the same. I'm not, as I'm standing here, sure of what's left of our complaint. I just don't want to cross that bridge. I would want to address that in the same briefing --

THE COURT: Well, but --

MR. OLSON: -- that we sent you so that if you're right about that --

THE COURT: But isn't --

MR. OLSON: -- is there anything left we can sue them --

THE COURT: But today's the date to address that. Why can't we address that now?

MR. OLSON: Well, you can.

THE COURT: I mean that they -- I'm not arguing anything they didn't argue.

MR. OLSON: No, I understand. I understand.

THE COURT: I don't think.

MR. OLSON: But in a motion to dismiss --

THE COURT: Right.

MR. OLSON: -- if the Court determines at the hearing that it doesn't look like the pleading passes muster, you typically get an opportunity to replead.

THE COURT: That's what I just said.

MR. OLSON: And we would want --

THE COURT: Are you asking me for leave to file an amended complaint in lieu of dismissal if I think the complaint has to be dismissed?

MR. OLSON: Sure.

THE COURT: Okay.

MR. OLSON: Sure.

THE COURT: I mean I think we're saying the same thing.

MR. OLSON: Yes, ma'am. Yes, ma'am. I would just want to leave that door open to see if we could take a stab at that if we're wrong --

THE COURT: Well, but what do you think is left? Because as I go through your first amended complaint, your first claim, misappropriation of trade secrets, would be gone because if they have no obligation to pay or to -- if they have no obligation to indemnify, and that was the only breach which you've told me before it is, then they haven't stolen anything. So, it appears that that claim fails.

MR. OLSON: Well, that's -- Mr. Smith has some thoughts on what might still remain, and if I could just leave that door open, he and I can confer to see if there's anything that --

THE COURT: Well, but --

MR. OLSON: -- we could add in a second amended --

THE COURT: But the -- we need to address it today. I mean the motion to dismiss is set today.

MR. OLSON: Well, can Mr. Smith address that?

THE COURT: Of course.

MR. OLSON: Thank you.

MR. SMITH: Your Honor, this license agreement -- the 1991 license agreement, in this essence, just covered 11 parts. On engines -- a number of engine models, of which there are far more than 11 parts in an aircraft engine.

Part of the claims here initially were -- obviously the indemnity has been discussed. Failure to insure as an ongoing obligation was something that we believe, you know,

survived, and was their requirement to keep the license in effect.

But even more than that, these other claims go far beyond these 11 parts. They're building hundreds of parts, and those other parts that are not supported and not permitted by this specific license agreement and by the terms of it is confined to the 11 parts is the rest of the -- it's the dog, essentially the license agreement is the tail. It's got 11 parts it covers, but there's this whole other host of parts out there that are being built and sold by this company that go well beyond those 11 parts, and those are still part of the claims of theft of trade secrets, using the information -- the derivative information, 11 parts, to build the other number of parts that are out here that are also part of the theft of trade secrets and conversion claims that exist, and that's a far greater claim than even the 11 parts are.

So, we would say there's a --

THE COURT: Where in your complaint do you tell us about that?

MR. SMITH: Let me --

THE COURT: Because I thought the whole issue was they didn't indemnify you, therefore, you terminated, therefore, they had no right under the license, therefore, they have misappropriated, they have done all these other bad things.

MR. SMITH: Well, that's -- in essence, Your Honor, that's the tail of it, but the rest of the dog is far greater because they're building all of these other parts, as well.

THE COURT: I understand the argument. But where in the complaint do I see --

MR. SMITH: Let me find it.

THE COURT: -- that as the allegation? Because I certainly didn't understand it from reading either the original complaint or the first amended.

MR. SMITH: It begins on Page 5, and it, in essence, details the part of -- if I might, let me digress. This is part of why the 1981 agreement was in there. It started out where there was a dispute about whether or not they could even build these parts for Lycoming. They reach an agreement in 1981 that there were a number of parts that they could build.

Because of ongoing concerns about building other parts, the 1999 agreement came, it squeezed it back down, it revoked the '81 agreement, and it says you're entitled to build 11 parts, as long as you continue to insure us, and as long as you indemnify us from the, you know, any lawsuits from those parts.

THE COURT: Show me where in the agreement it says the license is for 11 parts.

MR. SMITH: Let me do that. That is on Page --

THE COURT: Exhibit?

(Pause)

MR. SMITH: Your Honor, on Exhibit 21 --

THE COURT: Yes, sir.

MR. SMITH: -- it's Page 2.

THE COURT: All right.

MR. SMITH: And in there it says basically retention and provisions of proprietary materials --

THE COURT: Where are you looking? I'm sorry.

MR. SMITH: Uh, 2 --

THE COURT: So, 2B?

MR. SMITH: 2B.

THE COURT: All right.

MR. SMITH: And little -- little I. "Subject to the terms of this agreement, Superior shall retain the Lycoming drawings and specifications currently in its possession for the following 11 Lycoming parts, as well as any over or undersized version of those parts." And it gives the part numbers.

THE COURT: Okay.

MR. SMITH: And it goes down, it talks about Lycoming --

THE COURT: But you have to give them all future revisions to the drawings --

MR. SMITH: It does. And then it goes on down, it talks about derivative materials are part of the proprietary materials, that's little four. That means any information you

glean from this, that you, you know --

THE COURT: All right.

MR. SMITH: -- or derive from it. Then on C, where it says, “Grant license to use the proprietary materials,” it -- on Page 3, says at the bottom, the last two lines, the last part of the -- next to the last line, “All prior licenses from Lycoming to Superior to use proprietary and derivative materials, as well as any prior license to use any other Lycoming drawings, specifications, or information derived from such drawings or specifications are hereby revoked.”

So, basically it took that whole set of parts that were out in the field for which they had been building under the ‘81 agreement, squeezed it down to the 11 parts, and this is -- the 1999 document was the go-forward document.

THE COURT: Okay.

MR. SMITH: The problem we have here, in addition to the fact that they’re, you know, building parts and not providing the indemnity or the insurance is there’s this whole host of other parts out there for which they are building. They’re clearly certified by what the FAA calls “identicality,” it means it’s identical to the Lycoming part, probably because they had the Lycoming drawing, they offered it to FAA, got whatever PMAs they got to build that. Those parts they should not be building. They should not be building any derivative parts from the use of the proprietary data that they current

have, even from the 11 parts. And so that's part of this larger picture out here that's part of the theft of trade secrets, conversion, and the other -- the other issues that we have that are separate and apart from the license agreement. It's essentially all of the other parts that are built on Lycoming data that don't derive any rights at all from the 11-part license agreement.

THE COURT: Okay.

MR. SMITH: But --

THE COURT: I'm with you. But now where in the complaint do you say anything about this?

MR. SMITH: That's at Page -- that's under the first claim for relief on Page 5 where we're talking generally about all of the -- all of the parts is, you know, essentially all of the processes and whatnot that were Lycoming's, and we go down through the '81 agreement, and we're talking about --

THE COURT: Right.

MR. SMITH: -- failing to honor obligations regarding trade secrets, proprietary information that violated the confidential relationship established in the 1999 agreement, which says also you can't use any of that material to build any other parts. You can't use the derivative materials to build anything else, and that they understand that they can't do that, and it's a -- it grants a right to --

THE COURT: Yes, but the '81 agreement's no longer in

effect.

MR. SMITH: '81's not in effect. But what I'm talking about are the terms in the 1999 agreement that says --

THE COURT: Right.

MR. SMITH: -- that says -- it's on Page 4 of the 1999 agreement, it says, "Superior agrees it would be a breach of this agreement for Superior to utilize any Lycoming drawings or specifications not retained pursuant to Paragraph 2(b)(1)," which is the 11-part paragraph, "and 2(b)(2)," which are the continuing updates of those 11 parts, "or information derived from such drawings or specifications that is not contained in the proprietary material," not also contained in the proprietary materials for the purpose of applying to the FAA for a PMA pursuant to identicality method. Further, Superior agrees that any such breach would cause irreparable injury to Lycoming. And that in addition to the other available remedies, Lycoming would be entitled to enjoin such breach."

THE COURT: Okay. I understand what the license says. I'm asking about the allegations in the complaint. It -- it --

MR. SMITH: It's --

THE COURT: It doesn't appear very clear to me that you were talking about what you're now talking about, and I'm looking for where in the document you were talking about what you're now talking about.

MR. SMITH: I think it begins at Paragraph -- well, there's actually -- let me start at Paragraph 12, Your Honor. Hold on a just a second.

(Pause)

MR. SMITH: It says in Paragraph 12, "Upon information and belief, post bankruptcy case closing, Superior then illegally used this trade secret and proprietary information to obtain PMA approvals, to design and manufacture parts, and continue to do it at this time even though request to cease and desist from such activity, while continuing to claim and use Lycoming trade secrets and proprietary data as its own," -- on over on Page 10, begin post termination, "Defendant has used and continues to use trade secrets and other proprietary information to develop the designs and manufacturing processes for the manufacture and replacement of parts for Lycoming parts, defendant has embarked on a plan to improperly obtain, improper used the plaintiff's trade secrets and proprietary information knowing that it was improperly obtained, and used" --

THE COURT: Well, but the problem is -- and, again, the illegality was continuing to use it without paying you all or honoring the indemnity obligation. I mean that's the thrust --

MR. SMITH: That's --

THE COURT: -- of this whole complaint.

MR. SMITH: But that's not -- that's not -- maybe we haven't very artfully pled it, but this part is clearly beyond what's been pled in connection with the indemnity and --

THE COURT: With all due respect, it's not clear to me. I mean I read this stuff pretty carefully, and I thought the entire -- as did my staff, and we thought the entirety of the fuss was over the indemnity right, not that they were using more than the 11 parts that were licensed to them.

MR. SMITH: Without the -- without the licensing agreement, all -- any right at all to use any kind of Lycoming parts would cease.

THE COURT: Right. Under --

MR. SMITH: And so it seemed to me that was the simplest way to deal with it is that they're not indemnifying, and they're not insuring --

THE COURT: No, no --

MR. SMITH: -- and --

THE COURT: I'm --

MR. SMITH: But the --

THE COURT: I understand. I just --

MR. SMITH: And the other breach was and they're building stuff that's beyond their right to build as given in the 1999 license agreement. There's a host --

THE COURT: And all I'm saying is that sure didn't come through --

MR. SMITH: I understand.

THE COURT: -- in the complaint --

MR. SMITH: I hear -- I understand.

THE COURT: -- as I read it, at least.

MR. SMITH: I understand. But it's -- as we continue on, you can see that it's globally pled about the misuse of trade secrets and improperly obtaining information and using that. So, it's out there, it's not only -- it's not only the stuff that they have, we believe they continue to acquire information that they're using improperly. All of that is in violation of the license agreement, as well as giving an independent right to conversion and misappropriation of trade secrets, and the other allegations that are contained in the pleading. And we can --

THE COURT: Was a termination notice given?

MR. SMITH: Yes.

THE COURT: And where is that?

MR. SMITH: That's April the 2nd, and we have it.

MR. OLSON: It's Exhibit A to the brief.

MR. SMITH: Exhibit A to the brief.

MR. OLSON: Defendant's brief.

THE COURT: Well, that's not admissible before me. Is it an exhibit?

MR. OLSON: I think it's also got a number.

THE COURT: In the record.

MR. OLSON: Yes, ma'am.

(Pause)

MR. OLSON: I believe it's Exhibit 31, Your Honor.

THE COURT: Thank you.

(Pause)

THE COURT: But this demand letter is solely based upon the indemnification and insurance provision.

MR. SMITH: Judge, down at the last page, we set forth the other bases which are -- include the --

THE COURT: Where?

MR. SMITH: For example, on Page 3 --

THE COURT: Yes.

MR. SMITH: -- it says, "Superior's repudiation to its obligation" -- well, actually I guess it's 4, "Continued use of Lycoming's proprietary data" --

THE COURT: I don't know where you are. Number 4 the --

MR. SMITH: Page 3.

THE COURT: Page 3.

MR. SMITH: "Continued use of the Lycoming proprietary" --

THE COURT: Well, that's because you terminate for the --

MR. SMITH: It's not --

THE COURT: It's pretty clear to me that you were

terminating this as a result of the failure to insure and indemnify.

MR. SMITH: That's not the only reason, and the pleading --

THE COURT: Well, but that's all the -- that's all this letter says. Everything flows from that.

MR. SMITH: Well, also down on Page -- of the lower five items says about immediately returning to Lycoming all Lycoming data, including data derived from Lycoming immediately.

THE COURT: Well, I assume that under the license, once there's a termination of it, they have to return it. But the basis for termination was you didn't insure and indemnify us.

MR. SMITH: That wasn't -- that wasn't the intent, and that wasn't what we were trying to say. And I thought that we had it -- since there are -- there's probably 90 percent of the parts they built are not these 11 parts, I mean there's this whole host of other parts that are based upon Lycoming data that are not authorized by this license agreement that we are bringing to a conclusion, as well, because part of the problem was if we're not getting insurance, and we're not being indemnified, we need to bring it all to a close because we've got tremendous exposure out there from anything that's a Lycoming look-alike part. But it wasn't -- it clearly wasn't

the only -- I mean we could have limited it to just the license agreement and those 11 parts if that was what we were intending to do. But we were far more concerned with this entire array of parts that are being built by Superior that's -- creates an enormous liability exposure to Lycoming.

So, it's -- I'm not just here -- the pleading is a fairly lengthy pleading, it was -- we put it on file fairly quickly to try to bring up these issues that we thought were critical issues that needed to be addressed. So, I would say that if the Court would like for us to more specifically lay that out, I'll be pleased to do that. But I can tell the Court it was our intention to cover this multitude of other parts, as well, and certainly, you know, we don't have to terminate their right to -- you know, to -- we don't have to send them a letter of termination and say don't build our other -- these other parts that we know you're building using our data because they weren't covered by the 1999 agreement anyway. I mean we certainly were -- we put them on notice they needed to cease and desist from building those, but our position was is that they weren't entitled to build anything beyond the 11 parts, as the agreement said.

So, even if the Court came to the conclusion that there was a pass-through and they had a right to build 11 parts, that doesn't cover that -- they've got no right to build the other things that they're currently building, for which we

have a legitimate theft of trade secret claim beyond the scope of the 1999 agreement. We probably should have gotten the Court more information on this sooner, and I apologize for that.

THE COURT: Very well.

MR. SMITH: Thank you, Your Honor.

THE COURT: Thank you. Mr. Adams?

MR. ADAMS: Yes, ma'am. Your Honor, I sense that you've read our pleadings, and so I'm not going to go through and rehash a lot of the stuff that the Court has already picked up on.

The witnesses that we have here today were really going onto the issues that I think the Court has already addressed and, with the possible exception of one witness, I don't see any reason to call them to the stand.

THE COURT: Well, I mean, this was really opening argument in part, but obviously we got perhaps a bit beyond that. But if you have evidence you wish to put on, feel free.

MR. ADAMS: Yes, Your Honor. Your Honor, I think you've hit upon the key thing, which is that the claims -- with the possible exception of the business disparagement claim turned upon the issue of whether or not the indemnity provision was discharged in the bankruptcy. And I really don't see any point to dwell on that further unless the Court has any questions that you would like to ask of that.

Regarding the termination --

THE COURT: Are the -- is the reorganized debtor manufacturing more than the 11 parts?

MR. ADAMS: Your Honor, the reorganized debtor is manufacturing not only the 11 parts, but also all the oversize parts and undersize parts that were referenced in that paragraph of the licensing agreement that you read.

THE COURT: Well, let's look at that so that I better understand what the debtor is or isn't doing. So, let's look at Exhibit 21. So, under the Exhibit 21 agreement, you got the drawings and specifications for 11 parts, as well as over or undersized versions of those parts.

MR. ADAMS: Yes, Your Honor.

THE COURT: And do you agree that's all you're supposed to be manufacturing pursuant to this licensing agreement?

MR. ADAMS: Pursuant to this licensing agreement. There are other ways to manufacture the part, such as creating the part and applying for the PMA without any of the alleged trade secret proprietary rights information.

THE COURT: Right.

MR. ADAMS: And they have gone and manufactured other parts is my understanding, not relying upon that data.

THE COURT: And they've gotten PMAs from the FAA without using the proprietary information of Lycoming.

MR. ADAMS: That's my understanding, Your Honor.

THE COURT: So, you would dispute that you have developed parts in violation of the license agreement -- put aside the indemnity issue.

MR. ADAMS: Yes, Your Honor. Whether the indemnity survived or not, yes.

THE COURT: Your position is you're only doing what the license permitted you to do.

MR. ADAMS: Exactly, Your Honor. And whatever else we could do without needing a license --

THE COURT: Right.

MR. ADAMS: -- from Lycoming.

THE COURT: Right. But I suppose you would acknowledge that that could be a disputed factual issue as to whether you are doing something beyond what the license permits you to do or what law would permit you to do, i.e., develop your own stuff without relying upon them.

MR. ADAMS: It -- perhaps so, Your Honor. As Your Honor noticed, neither the original petition nor the first amended petition referenced a single one of the Lycoming part -- or a single piece of the alleged trade secret proprietary information that supposedly had been misused despite the fact that our original motion to dismiss contained that very allegation in there that needs to be dismissed because of the failure to identify any of the things that Superior is

supposedly violating.

And they've already had their one opportunity to replead. And if I hear them correctly today, they're up here asking for, you know, a second opportunity.

THE COURT: Well, but that -- that was a replead as of right.

MR. ADAMS: True, Your Honor.

THE COURT: So, they have not gotten court -- they had a replead as of right in response to the motion to dismiss under the federal rules.

MR. ADAMS: Correct, Your Honor.

THE COURT: So, this is the first time they've asked the Court for leave to allow them to take another stab at it.

MR. ADAMS: Yes, Your Honor.

THE COURT: Okay.

MR. ADAMS: Your Honor, if you'd like, I could go through the -- is there anything further that you'd like to hear on the motion to remand issue? Because we're -- on the motion to remand, we're not really deciding the merits of the claims. What we're deciding is whether or not the Court has jurisdiction to hear that.

If the Court would like to go on to the motion to dismiss, then I'm prepared to address that issue now.

Oh, on the -- on the advertising claim, which was called the business disparagement claim --

THE COURT: Yes.

MR. ADAMS: -- I do have a witness here today who can testify that that claim -- that advertising or similar advertising was being used as far back as 1987, I believe. And, therefore, obviously that would be a prepetition claim likewise that Lycoming should have listed along with its contingent unmatured claim that the Court discussed earlier.

THE COURT: Well, let me -- well, let me put it this way. Do you wish to put on any evidence?

MR. ADAMS: Your Honor, after being through the colloquy with counsel, I don't see any need to put on any additional evidence.

THE COURT: All right. Then let me -- why don't you take a seat for a minute. Let me tell you where I think we are, and then we'll see what's left to do.

MR. ADAMS: Yes, Your Honor.

THE COURT: So, I've granted the motion to reopen.

Mr. Olson, your motion to remand was also not terribly helpful in that you cite the Court, again, not a single legal authority with respect to remand. And this all seems to me to be premised upon the lack of jurisdiction of the Court arguing that these claims all arose post confirmation and, therefore, I don't have jurisdiction.

Am I missing something on your motion to remand?

MR. OLSON: No, ma'am. The first was you simply

don't have 1334 jurisdiction.

Or if you do, then the equitable remand under 1452 would be what we wanted.

THE COURT: Okay.

MR. OLSON: There's nothing more to it than that.

THE COURT: Right. But unfortunately you don't even cite that much to me in your motion. There is not a case, nor a statute, cited in the four pages of the motion.

THE COURT: I'm going to deny the motion to remand:

First, I think that this Court clearly does have jurisdiction. As we have just discussed, in the first instance based upon the current allegations and, frankly, the demand letter, the sole basis for declaring a breach of the 1999 agreements was the reorganized debtor's failure to insure and indemnify.

And that turns, as we've all agreed, on -- at least in the first instance -- whether or not this obligation to indemnify was discharged in the bankruptcy case.

Under Craig Stores, U.S. Brass, that is clearly a core determination by this Court. The scope of the discharge is something that is at the heart of the bankruptcy process. It arises under the Bankruptcy Code and, therefore, there is little doubt that this Court has core jurisdiction to decide whether or not the debtor breached the 1999 agreements, which by stipulation of these parties, you have all agreed, was not

an executory contract.

So, that contract, that right, the license agreement was property of the debtor's estate under Section 541.

And the effect of the plaintiff's, Lycoming Engines' -- which is a division, as I understand it, of Avco Corporation and Textron Innovations, Inc. -- failure to file a proof of claim and the impact of that are all issues that are issues that arise under the provisions of Title 11, question of Section 541, and the question of the effect of confirmation of a Chapter 11 plan, and the plaintiff's failure to file a proof of claim in the bankruptcy case.

So, given that the motion to remand is premised upon a lack of jurisdiction by this Court, it has to be denied because this Court concludes that it does have jurisdiction. Because at least as currently pled, everything is intertwined with the failure of the plaintiffs to file a claim, the effect of that failure on their ability to now declare a default of an agreement based upon the debtor's refusal to indemnify when the debtor believes that that obligation was discharged in its bankruptcy case.

I'm struggling slightly because now I understand -- although I didn't until Mr. Olson spoke -- that there is a request for equitable remand. Can you point me to something in your motion to remand that asks for equitable remand?

MR. OLSON: Yes, ma'am. Just at the tail end of it.

Either for lack of jurisdiction or to exercise its discretion. I don't have the --

THE COURT: Well, it's in Paragraph 17. I've got to tell you, if that's what you were arguing there, it is certainly cryptic. I mean your primary argument is in 16, that I had no jurisdiction --

MR. OLSON: That's right.

THE COURT: -- because this is all post confirmation stuff.

MR. OLSON: That's right.

THE COURT: It didn't have anything to do with the bankruptcy case.

MR. OLSON: I understand.

THE COURT: And, unfortunately, I think that's just wrong.

MR. OLSON: I understand.

THE COURT: It's not all post confirmation stuff. It is intertwined with what did happen or perhaps didn't happen in the bankruptcy case due to the plaintiff's failure to file proofs of claim to protect themselves.

I'm going to deny that portion of the motion. And, Mr. Olson, this is slightly frustrating to me. You have practiced before me for 13 years now. You know that my strong preference is to prepare thoroughly in advance for hearings, and rules from the bench at the time of the hearing when

everything is fresh in the Court's mind.

Because you cited me, frankly, nothing in your motions, and no legal authority in either motion, it makes it -- and now you want the opportunity to brief what could and, in my view, should have been briefed in advance of today's hearing, I'm now in the position where if I accommodate that request, I can't rule from the bench today, and I can't dispose of things as I would like to while everything is still fresh.

So, in the future, please don't file pleadings that are not helpful to the Court. And if you have a legal theory that you believe carries the day, it would certainly be helpful to your cause if you would share that with the Court in advance of the hearing so that I could have the opportunity to think about it, read your cases, and give that some thought.

I will deny the motion to remand in part to the extent that it is premised upon a lack of subject matter jurisdiction for the reasons I've just said.

I believe that the issues that are raised in the original complaint, which is the complaint against which I test jurisdiction given that it was the original complaint that was removed to this Court, that the bases alleged there for the plaintiff's ability to terminate the 1999 license agreement was the debtor's failure to abide by obligations that they claim were discharged through confirmation of a Chapter 11 plan in the underlying bankruptcy case.

Again, that implicates issues of property of the estate, the effect of the discharge in bankruptcy, all of which arise under the Bankruptcy Code and, therefore, this Court has core jurisdiction to decide those issues.

The argument, just to be clear, that this all arose post confirmation would go to the Fifth Circuit's decisions in Craig Stores and U.S. Brass, neither of which were cited by the movant. But that deals with post confirmation related to jurisdiction of the Court, which, at least at the moment, does not appear to be implicated here from this Court's perspective.

And so the fact that the plaintiff -- the plaintiffs are attempting to characterize these as all post confirmation claims is ineffective, one, because they aren't post confirmation claims, they all relate to pre-confirmation agreement, which the plaintiffs are attempting to enforce.

And, secondly, given that this Court does not believe that related to jurisdiction is the jurisdiction is the jurisdictional basis for this Court's jurisdiction, rather it is arising under or arising in, thereby making the claims core. We don't need to reach the issues raised in either U.S. Brass or the Craig Stores decisions.

The Court will carry, sadly, the request for, quote, "equitable remand" because of the failure of the plaintiffs to brief the issue so that the Court could analyze the theory upon which they are alleging that -- I think to quote Mr. Olson --

the debtor can't have its cake and eat it, too.

I don't know exactly how that might implicate equitable remand because, quite frankly, while I understand the feeling that this just isn't fair, I've had no legal authority cited to me from which I can come to the conclusion that while perhaps unfair from the plaintiff's perspective it is legally impermissible, as well.

So, I will carry that motion until I can better understand what the plaintiff -- plaintiffs are really arguing since that has not yet been supported by any legal authority in their favor.

That brings us to the motion to dismiss which, frankly, for the same reason, cannot yet be decided because, again, it apparently hinges on an argument not advanced by the plaintiffs until today. The so-called "cake and eat it, too" argument that somehow it is unfair and thus, legally impermissible for the debtor to not be required to indemnify the plaintiffs, notwithstanding the fact that the indemnity was discharged in bankruptcy if they wished to continue to exercise rights under the license agreement.

Until I understand that argument, and can dispose of it on the merits, it is impossible to analyze the motion to dismiss because, again, those become intertwined.

I will tell you if I do not find the plaintiff's argument to be persuasive, and I continue of my current view

that the indemnity obligation was discharged due to the plaintiff's failure to file a proof of claim in the bankruptcy case, and then have that contingent unmatured claim estimated for purposes of receiving benefits under the confirmed plan, then I think much, if not all, of the complaint will have to be dismissed because I don't believe you can steal something you have a legal right to.

And if the defendant is correct, that it has a perpetual license, and its indemnity obligation was discharged in bankruptcy, then it appears it might be in a position where it gets to keep the cake and eat it, too.

But, again, I can't decide that until I can understand better the merits of the argument being advanced by the plaintiffs here today, and whatever legal authority they can muster in support of that argument.

If it is helpful to the parties, I would grant a motion for leave to amend even if I concluded that this complaint currently fails to state a claim, either because you can't steal that which you have a legal right to, or because of Iqbal or Twombly pleading failures. I would give the plaintiffs one last chance to try and file a complaint that states appropriate claims.

So, unfortunately we're going to have to take this in pieces because the legal issues weren't briefed prior to the filing.

And so I guess rather than go down what the possible branches are right now, let's just leave it at how much time do you need to file your legal authorities, Mr. Olson, with respect to the theory upon which you think the indemnification obligation somehow survive the bankruptcy?

MR. OLSON: Well, Your Honor, I think that a week or ten days would be fine.

THE COURT: And then I assume you would like to respond.

MR. ADAMS: I'm sorry?

THE COURT: He said a week or ten days.

MR. ADAMS: Your Honor, we'd request about the same amount of time to respond.

THE COURT: Can you do it in a week?

MR. OLSON: Yes, ma'am.

THE COURT: Okay. Then today is the 15th. So that means the 22nd for Mr. Olson's brief, and the 29th for Mr. Adams' response.

MR. ADAMS: Your Honor, is that going to be right after Memorial Day?

THE COURT: It is.

MR. ADAMS: I hate to ask, but could we get a couple extra days so I don't have to --

THE COURT: That's fair.

MR. ADAMS: -- abuse staff over the weekend?

THE COURT: The 31st.

MR. ADAMS: Okay.

THE COURT: Let me think for a minute.

(Pause)

THE COURT: Well, the fastest thing -- and this is why it becomes difficult is now we're going to be 20 plus days out, and then working you back in on the calendar just -- well, let me think about it. I don't know whether we'll need a further hearing or not. Let's leave it at this: Mr. Olson, you file your brief on the 22nd. Mr. Adams, you file your response on the 31st, at which time the Court will consider the motion to dismiss and the request for equitable remand to be under advisement.

If I feel the need for a further hearing after reviewing the briefs, Ms. Salcido will be in touch with you to try and get you in as quickly as possible.

If I don't need the -- feel the need for a further hearing, I'll attempt to issue a ruling as promptly as possible. That may be just a telephonic ruling, and then if my conclusion is that there are problems with the first amended complaint, then, as I've said, in all likelihood, I will allow the plaintiffs one last chance to file a complaint that states a claim based upon the Court's rulings and satisfies the requirements of Iqbal, Twombly, and Rule 9(b) because this complaint, just word for the wise, seems a little short on

facts. And I think that it would have to be substantially improved in order to pass the Iqbal/Twombly muster.

All right. What else can we accomplish this afternoon, gentlemen?

MR. ADAMS: Your Honor, technically I think this all started with a request for a status conference in the adversary proceeding. Is there anything we need to do regarding that?

THE COURT: No. Normally, just so you know, when we get a removed action, we always set a status conference, and that way we can ask people if you're happy to be here, and if you are, get a scheduling order so that we get you on our trial docket. And if you're not, we can set time frames for motions to remand, so forth.

You all made it pretty clear, your respective positions on whether you wanted to be here or not in the pleadings that are already on file. So, I think we've covered everything that we would otherwise normally ask at our status conference, which is great.

So, thank you very much.

MR. ADAMS: Thank you, Your Honor.

MR. OLSON: Thank you, Your Honor.

THE COURT: We're in recess. You're excused. I'm going to be out here for a few minutes.

MULTIPLE SPEAKERS: Thank you.

(Whereupon, at 3:13 P.M., the hearing was adjourned.)

CERTIFICATE

I, KAREN HARTMANN, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Karen Hartmann* AAERT CET**D0475 Date: May 17, 2012

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